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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 WILLIAM GARCIA,

11 Plaintiff,

12 v.

13 AMY MILLER, et al.,

14 Defendants.

Civil 14cv2266 LAB (BGS)
No.

**REPORT AND
RECOMMENDATION RE:
GRANT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT [ECF NO. 25.]**

15
16 **I. Introduction**

17 On September 23, 2014, William P. Garcia ("Plaintiff") filed a complaint pursuant
18 to 42 U.S.C. § 1983, alleging civil rights violations for an event occurring on April 10,
19 2014. (ECF No. 1.) The alleged event took place during Plaintiff's incarceration at the
20 California Department of Corrections and Rehabilitation ("CDCR") at Centinela State
21 Prison in Imperial, California. (*Id.*) The complaint names Amy Miller, along with L.
22 Calderon, R. Johnson, R. Arias, J. Velasquez, D. Webb, V. Cortez, R. Boas, and F.
23 Sandoval, as Defendants. (ECF No. 1 at 2-4.) Defendants filed a Fed. R. Civ. P. 56
24 motion for summary judgment for failure to exhaust administrative remedies, as required
25 by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). (ECF No. 25-1 at
26 3.) For the reasons set forth below, the Court **RECOMMENDS** Defendants' motion for
27 summary judgment be **GRANTED**.
28

II. Factual Background

Plaintiff was transferred from SATF Corcoran State Prison to Centinela State Prison on August 23, 2013. (ECF No. 10 at 3; ECF No. 1 at 50.) Prior to his transfer, Plaintiff had previous litigation regarding his Kosher meals against SATF Corcoran State Prison. (ECF No. 1 at 50.) Plaintiff alleges he was ensured by CDCR that he could take his meals back to his cell to perform religious practices and prayers once he arrived at Centinela State Prison. (ECF No. 1 at 6.) Plaintiff ate his meals in his cell for several months after his arrival at Centinela State Prison. (ECF No. 1 at 7-8.)

Plaintiff claims that on April 10, 2014, Defendant Velasquez did not allow Plaintiff to take his Kosher breakfast outside of the dining hall. (ECF No. 1 at 5.) Plaintiff contends that Velasquez tried to rip the food out of Plaintiff's hand when Plaintiff refused to comply with his request to return to the dining hall. (ECF No. 1 at 8.) On the evening of April 10, 2014, Plaintiff alleges that Defendant Boas did not allow Plaintiff to take his dinner outside of the dining hall. (ECF No. 1 at 9.)

On April 11, 2014, Plaintiff exited the dining hall with his food and was stopped by Defendant Sandoval and told to return to the dining hall. (*Id.*) Plaintiff contends he was again unable to eat his Kosher meal according to his religious beliefs. (ECF No. 1 at 8.) Plaintiff states that when he tried to explain to Sandoval, he told Plaintiff, "Shut up or I will hurt you." (ECF No. 1 at 8.)

As a result of these events, Plaintiff claims he is continually persecuted by prison officials for his religious beliefs and practices via anti-Semitic acts and starvation, violating his Eighth Amendment rights. (ECF No. 25-3 at 5.) Plaintiff also states he is unable to freely exercise his religious beliefs and is unable to access the courts, violating the First and Fourteenth Amendments. (ECF No. 1 at 8-9.) Plaintiff claims prison officials violated his civil rights by retaliating against him for exercising his First Amendment right to pursue the prison grievance process against them and for his religious beliefs. (ECF No. 1 at 6.)

Additionally, Plaintiff contends that Defendants Miller and Calderon did not

properly train employees to promote the safety and security of inmates. (ECF No. 1 at 10-11.)

Finally, Plaintiff alleges that CDCR failed to provide him with an acknowledgment of receipt for his CDCR Form 602 Third-level Appeal. (ECF No. 29 at 2.) Therefore, he argues he did not know if the Third-level Appeal was received by CDCR Office of Appeals, and believed he had exhausted all administrative remedies prior to filing his complaint. (ECF No. 29 at 2.)

III. Relevant Background re: Exhaustion of Administrative Remedies

Plaintiff submitted an administrative grievance (log number CEN-14-00601) on April 14, 2014 regarding the claim that Plaintiff now asserts against Defendants in this action. (ECF No. 25-3 at 5.) Plaintiff's First-level grievance was denied on June 3, 2014. (ECF No. 25-3 at 10.) Plaintiff's Second-level Appeal was denied on July 14, 2014. (ECF No. 25-3 at 8.) Plaintiff filed his complaint on September 23, 2014, fifteen days prior to his Third-level Appeal denial, dated October 8, 2014. (ECF No. 1 at 1; ECF No. 25-3 at 5.)

Defendants' motion for summary judgment dated April 20, 2015 is based entirely on Plaintiff's alleged failure to exhaust administrative remedies related to the incidents underlying his § 1983 claims before filing his complaint. (ECF No. 25-1.) Plaintiff opposed Defendants' motion on May 11, 2015. (ECF No. 29.) Defendants' replied to Plaintiff's opposition to Defendants' motion for summary judgment on May 14, 2015. (ECF No. 30.)

III. Legal Standard

Summary judgment is appropriate if, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). At the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." *House v. Bell*,

1 547 U.S. 518, 559–60 (2006). A fact is “material” if it “might affect the outcome of the
 2 suit under the governing law,” and a dispute as to a material fact is “genuine” if there is
 3 sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving
 4 party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “If the evidence is
 5 merely colorable, or is not significantly probative, summary judgment may be granted.”
 6 *Id.* (internal citations omitted).

7 The moving party bears the initial burden of identifying those portions of the
 8 pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of
 9 material fact. *Celotex Corp.*, 477 U.S. at 323. Where the moving party will have the
 10 burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable
 11 trier of fact could find other than for the moving party, but on an issue for which the
 12 opposing party will have the burden of proof at trial, the party moving for summary
 13 judgment need only point out “that there is an absence of evidence to support the
 14 nonmoving party’s case.” *Id.* at 325; accord *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d
 15 978, 984 (9th Cir. 2007). Once the moving party meets its initial burden, the nonmoving
 16 party must set forth, by affidavit or as otherwise provided in Rule 56, “specific facts
 17 showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250.

18 **IV. Discussion**

19 **A. Failure to Exhaust Administrative Remedies**

20 ***1. The Prison Litigation Reform Act***

21 Under the Prison Litigation Reform Act (“PLRA”), a prisoner may not bring a
 22 federal action concerning prison conditions “until such available administrative remedies
 23 as are available are exhausted.” 42 U.S.C. § 1997(e)(a). Among the purposes of the
 24 PLRA is to allow prison officials a chance to resolve disputes regarding the exercise of
 25 their responsibilities before being haled into court; to reduce the number of prisoner suits;
 26 and to improve the quality of suits that are filed by producing a useful administrative
 27 record. *Jones v. Bock*, 549 U.S. 199, 204 (2007). To satisfy the requirements of the
 28 PLRA, exhaustion must be “proper.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). This

1 means that a prisoner must use all steps the prison offers, enabling the prison to reach the
 2 merits of the issue. *Id.* at 90. Prisoners need only comply with the prison's own
 3 grievance procedures to properly exhaust. *Bock*, 549 U.S. at 218. It is axiomatic that
 4 "[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its
 5 resolution, not to lay groundwork for litigation." *Id.*

6 Procedurally, failure to exhaust under the PLRA is an affirmative defense. *Bock*,
 7 549 U.S. at 216. In the Ninth Circuit, a motion for summary judgment is the proper
 8 vehicle to decide whether a prisoner has exhausted administrative remedies pursuant to
 9 the PLRA. *Albino*, 747 F.3d at 1170. A defendant has the burden to prove that there was
 10 an available administrative remedy, and that the prisoner did not exhaust it. *Id.* at 1172.
 11 If a motion for summary judgment is denied, disputed factual questions relevant to
 12 exhaustion are decided by the court. *Id.* at 1170-71. To the extent the court makes any
 13 factual findings that are relevant to both exhaustion and the merits, the court's findings
 14 made in the course of deciding exhaustion are not binding on a jury deciding the merits of
 15 the suit. *Id.* at 1171.

16 If a prisoner has not exhausted his administrative remedies before filing his federal
 17 suit, the court must dismiss the action without prejudice to the prisoner filing a new
 18 action after he has completed his administrative remedies. *See McKinney v. Carey*, 311
 19 F.3d 1198, 1200-01 (9th Cir. 2002). Finally, a prisoner "must complete the
 20 administrative review process in accordance with the applicable rules, including
 21 deadlines, as a precondition to bringing suit in federal court." *Ngo*, 548 U.S. at 88.

22 ***2. California Prisons' Grievance Procedures***

23 CDCR regulations allow a prisoner to appeal any action or decision by a prison
 24 official that adversely affects the prisoner's welfare. 15 Cal. Code Regs. § 3084.1(a). The
 25 CDCR's administrative exhaustion procedure was modified by amendment on December
 26 13, 2010, becoming effective on January 28, 2011. *See Manning v. Bunnell*, No.
 27 2:12-CV-2440, 2014 WL 1338312, at *3 (E.D. Cal. Apr. 2, 2014). In order to exhaust
 28 available administrative remedies within the current system, a prisoner must submit his

1 complaint on a CDCR Form 602 and proceed up to a third formal level of appeal filed
 2 with the CDCR director or designee. Cal. Code Regs. tit. 15, § 3084.1-3084.7.
 3 Third-level, or “Director’s level,” of review satisfies the administrative remedies
 4 exhaustion requirement under Section 1997e(a). *Barry v. Ratelle*, 985 F. Supp. 1235,
 5 1237 (S.D. Cal.1997); Cal. Code Regs. tit. 15 § 3084.1(b).

6 ***3. Plaintiff Did Not Exhaust Administrative Remedies Prior to Filing Suit***

7 Plaintiff filed the complaint on September 23, 2014. (ECF No. 1.) Accordingly,
 8 the court must determine whether Plaintiff exhausted his administrative remedies
 9 regarding the claim he asserts against Defendants prior to that date, and if not, whether
 10 Plaintiff may be excused from the prefiling exhaustion requirement. *See Sapp v.*
 11 *Kimbrell*, 623 F.3d 813, 823-24 (9th Cir. 2010).

12 Plaintiff contends he completed the grievance process when he filed his Third-level
 13 grievance, and therefore had exhausted all administrative remedies and could file an
 14 action in federal court. (ECF No. 29 at 2.) However, because he had not yet received a
 15 response from the CDCR Office of Appeal, the grievance process was not completed.
 16 *Cano v. Taylor*, 739 F.3d 1214, 1222 (9th Cir. 2014). Thus, Defendant has shown that
 17 Plaintiff filed this action prematurely, before he had exhausted all available
 18 administrative remedies. That is, there is no dispute as to any genuine issue of material
 19 fact regarding Plaintiff’s failure to complete the exhaustion of administrative remedies
 20 process before he filed this action in federal court.

21 To defeat Defendant’s motion, Plaintiff must demonstrate that there is a genuine
 22 dispute over a material issue of fact as to whether he exhausted available remedies prior
 23 to filing suit, or as to whether he should be excused from the exhaustion requirement. In
 24 *Nunez v. Duncan*, the Defendant was precluded from exhausting because of the Warden’s
 25 mistake, not due to his own fault. 590 F.3d 1217, 1224 (9th Cir. 2010). Because the
 26 Warden gave Defendant incorrect information to prepare his appeal, the Ninth Circuit
 27 excused Defendant’s failure to exhaust administrative remedies, because Defendant took
 28 reasonable and appropriate steps to exhaust his claim and was unable to do so. *Id.* at

1 1224-25.

2 Here, CDCR did not make a mistake that rendered Defendant's administrative
3 remedies effectively unavailable to him. Defendant had access to administrative
4 remedies and sought all three levels of administrative review. Because Defendant did not
5 receive his final administrative decision from the Third-level review prior to filing his
6 complaint, he failed to properly complete the administrative remedies process before
7 proceeding to federal court.

8 Plaintiff concedes that he "made an inadvertent mistake" and filed the complaint
9 fifteen days early. (ECF No. 29 at 2.) The Court of Appeals for the First, Second, Third,
10 Seventh, Tenth, Eleventh, and D.C. circuits have held that § 1997(e)(a) requires
11 exhaustion *before* the filing of a complaint and that a prisoner does not comply with this
12 requirement by exhausting available remedies during the course of the litigation.
13 *McKinney*, 311 F.3d at 1199.

14 Plaintiff contends that because he waited sixty days after the Third-level Appeal
15 was submitted to file a complaint in federal court, all available remedies had been
16 exhausted. (ECF No. 29 at 2.) The plain language of the statute, however, makes
17 completion of exhaustion a precondition to filing an action in federal court. *Brown v.*
18 *Toombs*, 139 F.3d 1102 (6th Cir. 1998.) For example, a court cannot stay an action to
19 provide opportunity for exhaustion after litigation has begun. *McKinney*, 311 F.3d at
20 1200. The exhaustion requirement is mandatory. *Booth v. Churner*, 532 U.S. 731, 741
21 (2001). Otherwise, there would be little incentive for prisoners to exhaust *prior* to filing
22 suit. *Jackson v. D.C.*, 254 F.3d 262, 270 (D.C. Cir. 2001).

23 Plaintiff proposes he should be permitted to continue with the present lawsuit by
24 filing an amended complaint, as opposed to filing a new complaint. (ECF No. 29 at 8.)
25 In *Rhodes v. Robinson*, the Ninth Circuit noted a prisoner may file an amended complaint
26 to add new claims to a pending suit where the additional cause of action arose after the
27 initial filing. 621 F.3d 1002, 1002 (9th Cir. 2010). This is permissible so long as
28 administrative remedies were exhausted as to those additional claims before an amended

1 complaint could be filed. *Id.* But the facts in *Rhodes* are not present here, because
 2 Plaintiff does not seek to add new claims in an amended complaint. As explained *supra*,
 3 a prisoner may not file first, then exhaust later. *Askhtar v. Mesa*, 698 F.3d 1202 (9th Cir.
 4 2012). Ninth Circuit case law establishes that Plaintiff cannot exhaust administrative
 5 remedies while the lawsuit is pending. *McKinney*, 311 F.3d at 1200.

6 Therefore, at the time Plaintiff filed his complaint on September 23, 2014, he had
 7 yet to receive a final decision from the Director's level of review that would satisfy the
 8 exhaustion requirement under § 1997e(a). *See Booth*, 532 U.S. at 739-41. Plaintiff
 9 argues that dismissing the case even though he has now exhausted his administrative
 10 remedies would waste time, money, and would burden the court. (ECF No. 29 at 2.)
 11 However, failure to receive a response to a grievance and thus filing suit is not analogous
 12 to completing the administrative exhaustion process. *See Jorss v. Vanknocker*, No.
 13 C97 3719CRB(PR), 2001 WL 823771, at *1 (N.D. Cal. July 19, 2001) aff'd, 44 F.
 14 App'x 273 (9th Cir. 2002) (explaining that a final decision from the Director's level of
 15 review satisfies the exhaustion requirement under § 1997e(a)). Plaintiff failed to follow
 16 the procedural rules and eliminated the prison's opportunity to fully examine the
 17 situation, evaluate a possible remedy, and then respond to Plaintiff's claims. *Reynolds v.*
 18 *Starceovich*, No. CIV S 11 0326 GEB, 2012 WL 602935, at *6 (E.D. Cal. Feb. 23,
 19 2012) subsequently aff'd, 513 F. App'x 688 (9th Cir. 2013). Plaintiff may initiate
 20 litigation in federal court only after the administrative process ends and his grievances are
 21 left unredressed. *Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006).

22 **V. Conclusion**

23 Having reviewed the matter, the undersigned Magistrate Judge recommends that
 24 Defendants' Motion for Summary Judgment be granted. Plaintiff's Complaint should be
 25 dismissed without leave to amend, but without prejudice to filing a new action once
 26 administrative remedies have been exhausted.

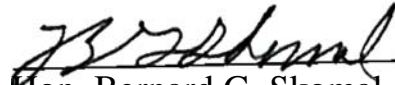
27 This Report and Recommendation of the undersigned Magistrate Judge is
 28 submitted to the United States District Judge assigned to this case, pursuant to 28 U.S.C.

1 sec. 636(b)(1).

2 **IT IS HEREBY ORDERED** that no later than, **July 10, 2015**, after receiving a
3 copy of this Report and Recommendation, any party to this action may file written
4 objections with the Court and serve a copy on all parties. The document shall be
5 captioned "Objections to Report and Recommendation."

6 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
7 the Court and served on all parties by **July 24, 2015**.

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9 DATED: June 19, 2015

10 
11 Hon. Bernard G. Skomal
12 U.S. Magistrate Judge
13 United States District Court
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